Held, that, in this case, there was abundant evidence to show that the appellant had fired the revolver he carried in an effort to evade arrest and that there was therefore no legal justification for interfering with the sentence.

Case referred to :—

(1) *Choh Wai Sung v. Public Prosecutor* (1946) 12 M.L.J. 119.

APPEAL TO COURT OF APPEAL.

The judgment of the Court of Appeal was delivered by :—

Carey, Ag. C.J. :—This is an appeal against sentence of death imposed in respect of the carrying of arms contrary to section 3 (1) of the Public Order and Safety Proclamation.

The appellant was found guilty by the assessors of carrying arms and thereafter the learned trial Judge, as he has stated, being satisfied on the evidence that the appellant used the firearm, by firing at a soldier whom he believed to be attempting to apprehend him, passed sentence of death, having in mind the guiding principles laid down in the case of *Choh Wai Sung v. Public Prosecutor*[1].

We desire to point out that the dictum of this Court in that case should be interpreted as laying down the principles on which this Court will act in reviewing sentences under section 3 (1) of the Public Order and Safety Proclamation, and not, of course, as restricting the discretion of the trial Judge as to the proper sentence to be imposed in any case. We feel obliged at the same time to state that in our opinion the law as it stands at present throws an exceptional and undesirable responsibility on a trial Judge in regard to sentence in that after the jury or assessors, as the case may be, have found that the accused was carrying arms contrary to the Proclamation, the Judge must then, to conform with the principles of sentencing laid down by the judgment of this Court in *Choh Wai Sung v. P. P.*, himself find whether or not the arms were actually used.

As the accused's life may depend on this finding it is, in our opinion, highly desirable that it should be placed within the province of the jury and that the law should be amended to effect this.

In the present case there is abundant evidence to support the verdict and the fact that the appellant fired the revolver he carried in an effort to evade arrest.

In these circumstances we can see no legal justification for interfering with the sentence.

The appeal is dismissed.

Appeal Dismissed.

E. A. S. WAGNER AND ANOTHER v. TAN ENG YEOW.

[App. Civil Juris. (Willan, C.J.) November 25, 1946]

Landlord and Tenant—Rent and Charged Land (Restriction) Enactment No. 14 of 1940, Section 7—Rent more than 14 days in arrears at date of issue of Notice to Quit—Rent subsequently paid up to date of expiration of notice—Whether acceptance of rent acts as waiver of right to proceed with ejectment proceedings without the permission of the Rent Assessment Board.

The plaintiffs are the trustees of the estate of Christian Wagner (deceased) and the defendant was the tenant of premises No. 32 Tamby Abdullah Road, Kuala Lumpur, which belongs to that estate. The defendant fell into arrears of rent from 15th March 1946 and on the 10th July 1946 the first plaintiff caused a notice to quit to be served on the defendant which expired on the 14th day of August 1946. On the 9th day of August 1946, the defendant paid the arrears of rent due in respect of the said premises from the 15th day of March 1946 up to the 14th day of August 1946, being the date of expiration of such notice, but no rent was paid or received beyond that date. On the 17th day of August 1946 the first plaintiff filed a plaint in the District Court, Kuala Lumpur, claiming an order for the ejectment of the defendant from the said premises and also double rent for "holding over" from the 14th day of August 1946 to the date of delivery of vacant possession. The District Judge dismissed the suit with costs without calling evidence on the grounds (1) that at the time of the presentation of the plaint the defendant was not in arrears with his rent (2) that Section 7 of the Rent and Charged Land (Restriction) Enactment 1940 requires the permission in writing of the Rent Assessment Board to be obtained as a prerequisite to the taking of any step towards the ejection of a tenant by a landlord and (3) that the proviso to Section 7 of the Rent and Charged Land (Restriction) Enactment does not apply and therefore the proceedings were illegal **ab initio**. The plaintiffs appealed against this decision.

Held, (1) that as the defendant had been in arrears with the payment of his rent for more than fourteen days on the day the notice to quit was issued, the plaintiff was entitled to take steps to eject the defendant from the premises without obtaining the permission of the Rent Assessment Board by virtue of the proviso to Section 7 of the Rent and Charged Land (Restriction) Enactment, 1940;

(2) that the plaintiff had not in accepting rent up to, but not beyond, the period of the notice to quit

waived his right to proceed with the ejectment proceedings without the permission of the Rent Assessment Board.

Cases referred to :—

(1) *Blyth v. Denneth* 13 C.B. 178.

(2) *Keith Prowse & Co. v. National Telephone Company* (1894) 2 Ch. 147.

APPEAL from Civil District Judge.

Willan, C.J. :—In this case the premises known as 32 Tamby Abdullah Road, Kuala Lumpur, belong to, and form part of, the Estate of Christian Wagner (deceased), and the plaintiffs-appellants are the trustees of that Estate. The defendant-respondent rented the said premises, which are subject to the provisions of the Federated Malay States Rent and Charged Land (Restriction) Enactment, 1940, at a monthly rental of thirty-six dollars.

On the 5th day of February, 1946, the first plaintiff-appellant, being the only trustee within the jurisdiction of the Court, caused a notice to quit to be served on the defendant-respondent for non-payment of rent on the said premises since the 1st day of October, 1945. This notice demanded vacant possession of the premises by the 15th day of March, 1946. The defendant-respondent neither complied with the notice nor did he pay the rent due. Accordingly, on the 1st day of July, 1946 the first plaintiff-appellant levied distress upon the movable property of the defendant-respondent in the said premises, for satisfaction of the rent due and payable up to the date of expiration of such notice. After the levy of distress the defendant-respondent paid the rent due up to the said 15th day of March, 1946, together with the costs of the distress, and the movable property distrained upon was released.

The defendant-respondent again fell into arrears of the payment of rent, and on the 10th day of July, 1946, the first plaintiff-appellant caused a second notice to quit to be served on the defendant-respondent which expired on the 14th day of August, 1946. This notice was founded solely on the non-payment of rent from the 15th day of March, 1946. It is this second notice with which we are concerned in this appeal.

On the day that notice was issued it is not disputed that the defendant-respondent had been in arrears with the payment of his rent for more than fourteen days. Hence the first plaintiff-appellant was entitled to take the first step towards ejecting the defendant-respondent from the premises without obtaining the permission of the Rent Assessment Board by virtue of the proviso to section 7 of the Federated Malay States Rent and Charged Land (Restriction) Enactment, 1940.

It is further not disputed that on the 9th day of August, 1946, the defendant-respondent paid the arrears of rent due in respect of the said premises from the 15th day of March, 1946, up to the 14th day of August, 1946, being the date of expiration of such notice, but no rent was paid nor received beyond that date.

On the 17th day of August, 1946, the first plaintiff-appellant filed a plaint in the District Court, Kuala Lumpur, claiming an order for the ejectment of the defendant-respondent from the said premises and also double rent for "holding-over" from the 14th day of August, 1946, to the date of delivery of vacant possession.

When the case came on for hearing, the District Judge dismissed the suit with costs, without calling any evidence, on the following grounds :—

(i) At the time of the presentation of the plaint namely 17th August, 1946, the defendant was not in arrears with his rent.

(ii) Section 7 of the Rent and Charged Land (Restriction) Enactment, 14 of 1940, requires the permission in writing of the Board constituted under that Enactment to be obtained as a prerequisite to the taking of any step towards the ejection of a tenant by a landlord.

(iii) The proviso to Section 7 of Enactment 14 of 1940 could not be invoked, and therefore the proceedings were illegal ab initio.

As I have already stated, the first plaintiff-appellant was entitled to issue the notice to quit without the permission of the Rent Assessment Board as the first step towards ejecting the defendant-respondent, because rent had been in arrears for more than fourteen days. The question is whether the first plaintiff-appellant in accepting rent up to, but not beyond, the period of the notice to quit waived his right to proceed with the ejectment proceedings without the permission of the Rent Assessment Board.

A notice to quit, at its expiration, terminates the tenancy absolutely. If there has been any waiver, a new tenancy is created. The only question to consider in this appeal is whether the acceptance of rent by the first plaintiff-appellant up to, but not beyond, the expiration of the notice to quit constitutes waiver. On

the authority of *Blyth v. Denneth*[1] and *Keith Prowse & Co. v. National Telephone Company*[2] it does not. Accordingly the notice to quit had not been waived, and the tenancy had been determined as from the 14th day of August, 1946.

The provisions of the Federated Malay States Rent and Charged Land (Restriction) Enactment, 1940, are designed to protect tenants and sub-tenants only so long as they fulfil their legal obligations to their landlords. Payment of rent, when due, is one of those obligations, and failure to do so takes away the protection of that Enactment from the defaulting tenant. Once the rent has been in arrears for more than fourteen days the landlord is entitled to issue a notice to quit without the permission of the Rent Assessment Board. Once that protection is lost the tenant cannot regain it by paying the arrears of rent due, and the landlord does not waive his rights of ejectment by accepting rent from the tenant up to the date of the expiration of the notice to quit.

To hold otherwise would place landlords in an impossible position, because tenants would be able to default time and time again and only pay the rent in arrears when landlords issued notices to quit. This would mean that landlords would be forced to issue notice after notice, and each such notice could be rendered useless by subsequent payment of the rent in arrears. Since the provisions of the Rent and Charged Land (Restriction) Enactment, 1940, interfere with private rights, they must be construed strictly, and not in such a way that tenants would be able to default continually in payment of rent when due, and only pay such rent when ejectment proceedings had been commenced by the issue of a notice to quit.

Accordingly this appeal must be allowed. As regards costs, the first plaintiff-appellant stated on the hearing of the appeal that, although he is an Advocate and Solicitor, he had appeared in person on the appeal because he wished to save the defendant-respondent costs in the event of the appeal succeeding, as this is in the nature of a test case. Hence the first plaintiff-appellant is entitled to his out-of-pocket costs only.

The case is remitted back to the District Court at Kuala Lumpur and should be proceeded with on the footing that no permission of the Rent Assessment Broad is necessary as a prerequisite to the institution and determination of the suit.

Order Accordingly.

R. v. LOK KEAN CHUAN AND 4 OTHERS.

[Orig. Crim. Juris. (Carey, J.) November 15, 1946]

Public Order and Safety Proclamation, Section 3 (1)—Carrying arms—Factors to be taken into consideration in assessing sentence—Trial by jury.

In this case the five accused were tried before a judge and jury and were found guilty of carrying arms contrary to Section 3(1) of the Public Order and Safety Proclamation. In passing sentence, the learned Judge held that he could sentence the accused merely in respect of the offence of carrying arms of which they have been found guilty, without proceeding to find further facts as to the use of arms or the existence or non-existence of a common intention to use arms.

Case referred to :—

(1) *Choh Wai Sung v. Public Prosecutor* (1946) 12 M.L.J. 119.

CRIMINAL TRIAL.

Carey, J. :—The jury by an unanimous verdict has found the first three accused guilty of carrying arms contrary to section 3 (1) of the Public Order and Safety Proclamation and the fourth and fifth accused guilty of the same offence by a majority of five to two, in which finding I concurred.

Having regard to the judgment of the Court of Appeal in the recent case of *Choi Wai Sung vs. Public Prosecutor*[1] by which I should be guided, it seems to me that the peculiar situation arises, in that the jury, the judges of fact, are merely concerned with the bare finding of fact as to the carrying of arms whereas I, as judge, am obliged to arrive at more important findings of fact in respect of the same charge in order to decide what is the proper sentence to impose in respect of each accused.

In the case I have cited certain guiding principles to be observed in assessing the quantum of punishment are laid down and these involve findings of fact by the judge as to whether or not firearms were used or an attempt to use them was made and, where more than one person is charged, findings as to whether or not there was a common intention to use arms.

Where the trial of an offence for which the death penalty may be imposed is conducted before a judge, with a jury or with assessors, it seems to me quite contrary to the principles of trial by jury that the findings of facts upon which the life of the accused may depend should be witheld from the consideration of the jury or assessors.